

ARKANSAS SUPREME COURT

No. CR 06-544

NOT DESIGNATED FOR PUBLICATION

ROBERTO BENAVIDEZ
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered November 9, 2006

PRO SE MOTION TO FILE BELATED
BRIEF [APPEAL FROM THE CIRCUIT
COURT OF PULASKI COUNTY, CR
2000-34, HON. WILLARD PROCTOR,
JR., JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In February 2002, a jury convicted appellant Roberto Benavidez of capital murder and sentenced him to life imprisonment without parole. This court affirmed the judgment. *Benavidez v. State*, 352 Ark. 374, 101 S.W.3d 242 (2003). Appellant filed a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied by the trial court. Appellant brought an appeal of that order in this court that was subsequently dismissed on motion of the appellee without a written decision. *Benavidez v. State*, CR 04-98 (Ark. dismissed January 13, 2005) (*per curiam* order).

On December 28, 2005, appellant filed in the trial court a pleading captioned “‘Petition, to Vacate’ And/or Set-Aside Judgment” that requested relief under Act 1780 of the 2001 Acts of Arkansas, codified as Ark. Code Ann. §§ 16-112-201 – 16-112-207 (Repl. 2006). The trial court denied the petition. Appellant filed a timely notice of appeal and lodged the record in this court. Appellant tendered a brief, but ten days after the date due. Our clerk correctly declined to accept the brief for filing as it was not tendered within the time required. The appellee filed a motion to

dismiss, and this court entered an order granting appellee's motion, pending a motion to file belated brief. *Benavidez v. State*, CR 06-544 (Ark. September 7, 2006) (*per curiam* order). Appellant has now filed such a motion, and we dismiss the appeal. The motion is therefore moot.

Appellant contends that the brief was tendered late as a result of problems and delays he experienced due to his incarceration. He does not, however, explain how these delays prevented him from filing for an extension of time in which to file his brief prior to the due date. All litigants, including those who proceed *pro se*, must bear responsibility for conforming to the rules of procedure. *Peterson v. State*, 289 Ark. 452, 711 S.W.2d 830 (1986) (*per curiam*); *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984) (*per curiam*); *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983) (*per curiam*). See also *Tarry v. State*, 353 Ark. 158, 114 S.W.3d 161 (2003) (*per curiam*). The *pro se* appellant receives no special consideration on appeal. *Elliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000); see *Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989). In order for this court to grant leave to file a belated brief, an appellant must state good cause for his delay in requesting an extension of time in which to file his brief or tendering his brief in a timely manner. In any case, however, it is clear on the record before us that appellant could not prevail in his appeal.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (*per curiam*); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (*per curiam*); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (*per curiam*). Appellant's petition requesting relief under Act 1780 was not timely filed, and the trial court did not have jurisdiction to consider the pleading for relief under Act 1780.

Act 1780 was amended by Act 2250 of 2005, effective August 12, 2005. As revised, section 16-112-202(10) provides that a motion for relief under the act must be made in a timely fashion. Section 16-112-202(10) further provides for a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction, and lists five grounds by which the presumption may be rebutted. Appellant filed his motion for relief under the act more than thirty-six months after his conviction.

In order to overcome the presumption, a petitioner must establish, in the petition, one of the grounds listed in section 16-112-202(10)(B). *Douthitt v. State*, ___ Ark. ___, ___ S.W.3d ___ (June 15, 2006) (*per curiam*). Under the act, a petitioner may establish that his petition is timely through a showing that his incompetency substantially contributed to the delay in bringing the petition for testing, that the evidence to be tested is newly discovered, or that a new method of technology that is substantially more probative than prior testing is available. A petitioner can rebut the presumption through other good cause, but may not do so solely through an assertion of his innocence and that denial would result in manifest injustice. *See id.* Appellant did not address the delay in bringing the petition for testing.

Appellant did raise issues in his petition concerning his competency to stand trial and to aid in his defense, but he did not assert that his incompetency substantially contributed to, or in any way contributed to, the delay in filing his petition for testing. Nor did appellant request testing of any newly discovered evidence or indicate that there was any new method of technology to be utilized. Appellant did not address the delay in any way.

Because appellant failed to rebut the presumption that the petition was untimely, the trial court did not have jurisdiction to consider the pleading for relief under Act 1780. It is clear from

appellant's claims that he could not prevail, and we must dismiss the appeal.

Appeal dismissed; motion moot.

Glaze, J., not participating.